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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 365-366

FREDERICK M. FISCH, et al.,
Petitioners,
v.
GENERAL MOTORS CORPORATION,
a Delaware corporation,
and
JOHN D. BATEMAN, et al.,
Petitioners,
v.
FORD MOTOR COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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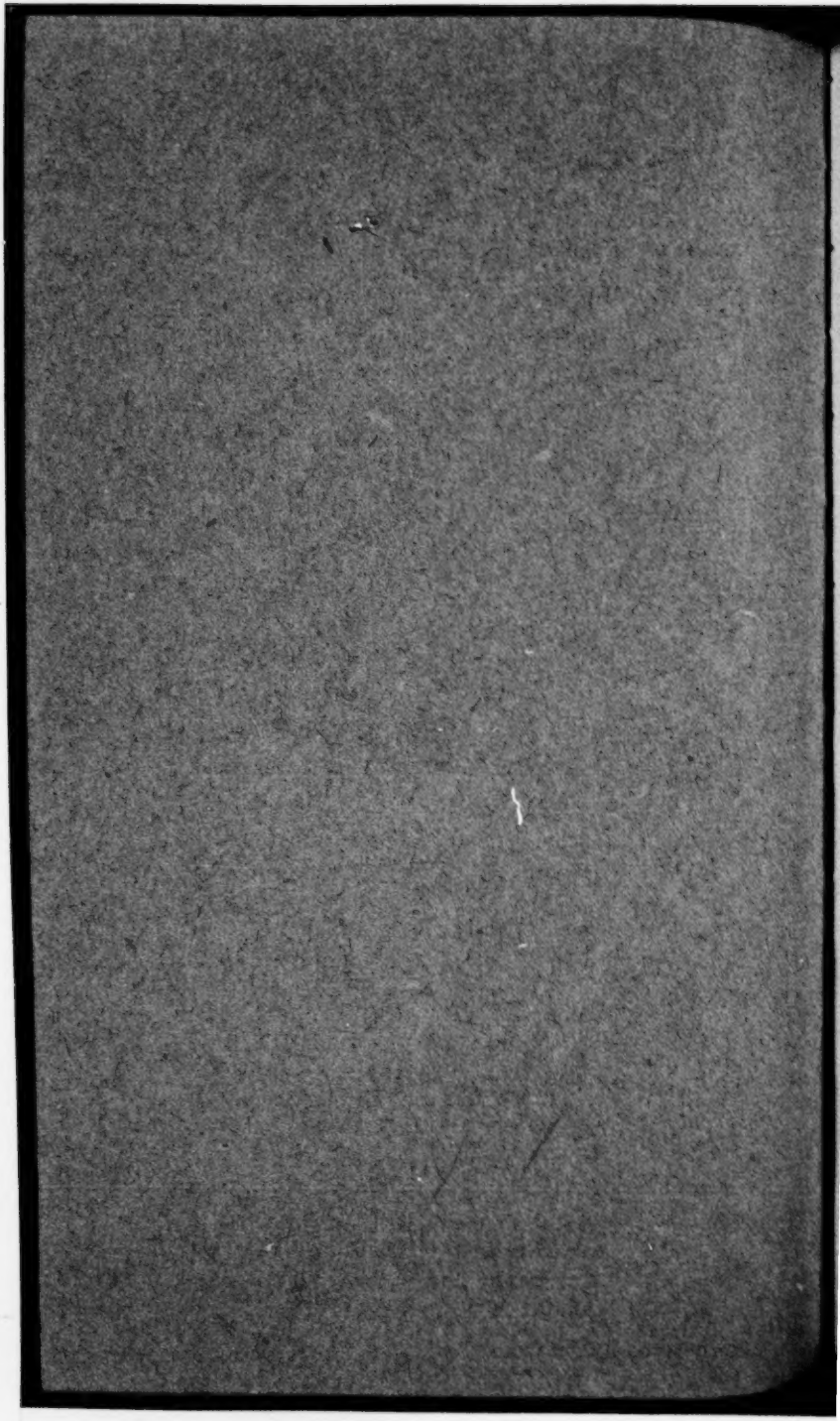

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Frederick M. Fisch, et al., and John D. Bateman, et al., petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cases August 2, 1948.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 17) are reported in 76 Fed. Sup. 178. The opinion of the Circuit Court of Appeals (R. 35) is reported in 169 Fed. 2nd 266.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 2, 1948 (R. 33). The jurisdiction of the Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May the complaint as amended in the instant case be dismissed on motion before a hearing on the merits?

2. Does the complaint as amended in the instant case, alleging an independent cause of action, state a claim for relief not barred by the Portal-to-Portal Act of 1947?

3. Does the Portal-to-Portal Act of 1947 violate article III, Section 1 of the Constitution of the United States as an attempt by Congress to exercise judicial power reserved to the courts?

4. Does the Portal-to-Portal Act of 1947 deprive the petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

STATUTES INVOLVED

The Portal-to-Portal Act of 1947 (Public Acts 49—80th Congress).

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060) 29 U. S. C. (Sec. 201-219) are as follows:

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

STATEMENT OF THE CASE

Petitioners seek in this action to recover for unpaid overtime compensation claimed to be due them from the appellee. Their original complaint (R. 2) alleged that appellee was liable to them for unpaid overtime compensation under Section 7, and liquidated damages and attorney fees under Section 16 (b) of the Fair Labor Standards Act of 1938, C. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201 et seq., (hereinafter called the "Act").

Subsequent to the filing of the original complaint, the Portal-to-Portal Act of 1947 (Public Law 49—80th Congress) was adopted. This Act, which purported to relieve all employers from wage liability under the Fair Labor Standards Act of 1938 and to withdraw jurisdiction from the courts to entertain suits to enforce such liability, excepted inter alia activities which were compensated by

> "an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer" (R. 27).

Appellee moved in the court below to dismiss the complaint "for lack of jurisdiction over the subject matter" (R. 10). It contended that the complaint did not allege facts sufficient to bring the employees' claims within the Portal-to-Portal Act of 1947.

Prior to decision on appellee's motion, the petitioners, by permission of the court below, filed an amendment to their complaint.

This amended complaint (R. 12) set forth a distinctly different theory of recovery. It alleged that during the period covered by the complaint there existed a contract or contracts between appellee and the United States under the terms of which appellee obligated itself to pay appellants for overtime work in accordance with the Fair Labor Standards Act of 1938; that said contractual obligation was inserted in said contracts for appellants' benefit, and the obligation having been breached by appellee, appellee was liable upon the contract or contracts for the damages alleged to have resulted to appellants from the breach. Since appellants' claims under this theory arise *out of contract*, and are not predicated upon Section 16 (b) of the Act, no claim was made in the amendment for liquidated damages and attorney's fee.

By order filed March 4, 1948 (R. 28) the district court granted appellee's motion and dismissed appellants' action. The opinion of the court below appears in the record at pages 35 *et seq.*

From this action of the court below appellants have prosecuted this appeal.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

THE MOTION TO DISMISS IS PREMATURE

It is familiar law that a pleader is not required to anticipate defenses which might be raised to his pleading and which might remove a cause from the jurisdiction of the court in which the action is brought. Such a defense must be raised by answer and not by a motion to dismiss. See *Ward Baking Co. v. Holtzoff* (C. C. A. 2, 1947), 164 F. 2d 34, applying this rule to suits under the Fair Labor Standards Act subsequent to the Portal-to-Portal Act of 1947. See also *Deaton v. Titusville Bldg. Corp.*, (S. D. 114, 947), 72 F. Supp. 986; and *Moore, Supplement to Vol. 1 of Federal Practice*, page 265.

There can be no question that the complaint was valid when filed several months before the effective date of the new Act. The new Act, like the old, purports to ground jurisdiction upon the existence of *facts* and not upon allegations contained in a complaint. *Burton v. Zimmerman* (C. C. A. 4, 1942), 131 F. (2d) 377; *DeLoach v. Crowley*, (C. C. A. 5, 1942) 128 F. (2d) 278; and *Plunkett v. Abraham Bros. etc.*, (C. C. A. 6, 1942), 129 F. (2d) 419.

In *Bozant v. Bank of N. Y.*, 156 F. (2d) 78, Judge Learned Hand stated, in reversing a summary judgment dismissing a complaint under the Fair Labor Standards Act,:

> "We cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on a motion for summary judgment."

See also: *Royalty Service Corp. v. Los Angeles*, 98 F. (2d) 551; *Cohn v. Cities Service Co.*, 45 F. (2d) 687; *Hood v. Bell*, 84 F. (2d) 136; and *Dioguardi v. Durning*, 139 F. (2d) 774.

The constitutionality of an Act of Congress as applied to a specific case should be decided only after full presentation of the facts in issue.

In *Ward Baking Co. v. District Judge*, 164 F. (2d) 34, the Court stated:

> "It is inexpedient to attempt to decide a constitutional question such as this *in vacuo* (an application for writ of mandamus to compel District Judge to dismiss a portal-to-portal action); after the facts respecting the employees' overtime activities have been fully developed, the answer may more clearly appear. See *Borden's Co. v. Baldwin*, 293 U. S. 194, 213."

To the same effect is the decision of the Supreme Court in *Polk Co. v. Glover*, 305 U. S. 5, reversing a decree which overruled a plea of unconstitutionality and granted judgment on the pleadings. The Court said:

> 'The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable."

As stated by Willoughby in his *"Constitution of the United States,"* 2d ed. 1929, p. 15, "The question as to the constitutionality of a law * * * may depend upon the particular facts to which it is sought to be applied."

See also: *Kennedy v. Silas Mason Co.*, 7 W. H. Cases 1022, decided 5/17/48; *Bordens Farm Products v. Baldwin*, 293 U. S. 194.

In the instant case no facts were before the Court below and no facts are before this Court at this time. Even appellee's motion fails to indicate the absence of the jurisdictional facts; it merely alleges the absence of particular words from the complaint. Whether or not the Act applies to the actual facts can not be determined on this motion.

II.

THE COMPLAINT STATES A CAUSE OF ACTION UNDER CONTRACT ENTIRELY INDEPENDENT OF THE FAIR LABOR STANDARDS ACT AND THE PORTAL-TO-PORTAL ACT

Paragraphs XIX to XXIII, inclusive, (R. 13, 14) of the complaint constitute a separate and distinct theory of recovery which is not barred by Section 2 (a) of the Portal-to-Portal Act even without regard to the exceptions therein contained. Indeed, this theory of recovery is neither predicated upon nor is it dependent upon the continuing validity or existence of the Fair Labor Standards Act with or without its amendment by the Portal-to-Portal Act.

The theory of this separate and distinct ground for recovery is the familiar principle of law which recognizes the right of a person for whose benefit a contract is made, to sue upon that contract in the event of a breach resulting in damage to him. The principle, applicable in many

aspects of contract law (see *Annotation in 38 A. L. R.* p. 403), has received general recognition in cases involving suits by employees of public contractors to recover wages as stipulated in the contract between their employer and the public agency. In such cases the contract reference to the statute merely establishes the yardstick measuring the extent of the defaulting employer's liability. The action to recover the contract wage is grounded upon the contract itself and not upon the statute which the contract incorporates by reference.

Appellants' theory that as beneficiaries of the contract or contracts between appellee and the Government, they are entitled to recover *on that contract,* finds support not only in general contract law (see *Annotations at 144 A. L. R.* 1035 and *38 A. L. R.* 403), but in authoritative cases involving the same issue under the Federal Eight-Hour Law and the Federal Davis-Bacon Act.

Filardo v. Foley Bros. 297 N. Y. 217; *Gillioz v. Webb,* 99 F. (2d) 585. In the *Filardo* case the Court stated on page 815:

> "In our view, defendants' promise to 'obey and abide,' was, in effect, a promise to pay their workers such extra compensation for overtime work, and any aggrieved laborer or mechanic may bring suit to enforce that promise as a third party beneficiary."

and the *Gillioz* case holds that:

> "Plainly and specifically authorized by, indeed, taken from the statute, there can be no doubt of the validity and binding force of this provision of the contract, or that, written in as part of the public policy of the United States, to insure the payment of adequate wages on public work, its provisions should be liberally construed to effectuate its purpose."

See also: *Stover v. Winston Bros.*, 185 Wash. 416; *Fata v. Healty Co.* (N. Y. Ct. of App., 1943) 289 N. Y. 401, 46 N. E. 2d 339, 144 A. L. R. 1031; *City of Phoenix v. Drinkwater*, 46 Ariz. 470 (1935); *McDaniel v. Brown & Root, Inc.*, (E. D. Okla. 1948) 7 WH Cases 981; *Crabb v. Wilden*, (S. D. Iowa, 1946) 65 F. Supp. 369.

III.

CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT

A.

Section 2(d) of the Portal-to-Portal Act of 1947, attempting to withdraw jurisdiction of this type of case from the Federal Courts, is an unconstitutional usurpation by the Congress of judicial power

1. Section 2(d) provides a Rule of Decision and not a limitation on jurisdiction of the Courts

It is clear, of course, that the power of Congress to control the jurisdiction of federal courts is "plenary" (*Kline v. Burke Construction Co.* 260 U. S. 226), and that it has similar control over the jurisdiction of state courts with respect to questions arising under federal laws, or in the general area of federal power (*Bowles v. Willingham*, 321 U. S. 503). It is also true that when this control over jurisdiction is exercised in a proper and constitutional manner, "all pending cases, though cognizable when commenced, must fall." (*Kline v. Burke Construction Co., supra.)*

It is equally clear, however, that Congress may not use the device and subterfuge of "jurisdictional control" to accomplish substantive action which is beyond its power:

> "Under the mere guise of realizing something within its powers, Congress may not lay a charge upon what is beyond them."
>
> *Nichols v. Collidge*, 274 U. S. 531.

In order to determine whether Sec. 2 (d) can be sustained as a legitimate exercise of congressional authority over the jurisdiction of state and federal courts, we thus must first determine the exact meaning of the term "jurisdiction," as used in the decisions of the Supreme Court on this subject. The most useful definition of this term is found in *General Investment Co. v. New York Central Railroad Company*, 271 U. S. 228:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought."

An earlier case, *Ex Parte Watkins*, 7 Pet. 568, 8 L. Ed. 786 clarifies this concept:

> "But the jurisdiction of the Court can never depend upon its decision upon the merits of the case brought before it but upon its right to hear and decide it at all."

When Sec. 2 (d) is analyzed in terms of these definitions, it will readily be seen that what is here attempted by the Congress is not actual control over jurisdiction, but the destruction of certain substantive rights; in other words, what is set up is a rule of decision on the merits of an existing case, since the denial of jurisdiction is limited to the cases specifically and factually described in Secs. 2 (a) and 2 (b). *United States v. Klein*, 13 Wallace 128, 20 L. Ed. 519.

In *Graham v. Goodcell*, 282 U. S. 409 at 431, Chief Justice Hughes wrote:

> "If the Congress did not have the authority to deal by a curative statute with the taxpayer's asserted substantive right in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayer all remedy both as against the U. S. and also as against the one who committed the wrong."

Judge Brandeis stated, in *Brinkerhoff-Farris Co. v. Hill*, 281 U. S. 673:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The general rule with respect to the power of Congress or a state legislature to interfere with substantive rights through the device of remedial legislation is stated in *Lynch v. U. S.*, 292 U. S. 571:

> "Contracts between individuals are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

Here the right to enforce appellants' claim under the Fair Labor Standards Act of 1938 is not "materially lessened;" it is entirely destroyed by the Portal Act. ***We confidently assert that no case in the Supreme Court can be found approving the total destruction of remedies, through the device of jurisdictional control or otherwise, where Congress or the state legislature lacked power to destroy the right involved by direct enactment.***

2. Section 2(d) contravenes the constitutional separation of powers

"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives" (*United States Constitution*, Article I, Sec. 1.).

"The executive power shall be vested in a President of the United States of America." (*United States Constitution*, Article II, Sec. 1.)

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." (*United States Constitution*, Article III, Sec. 1.)

The principle of the separation of powers enunciated in these phrases of the Constitution, the endowment of Congress with exclusive legislative power, of the President with exclusive executive power, of the Courts with exclusive judicial power, the prohibition against the encroachment of one branch upon the sphere reserved for each of the others are the very heart and core of our constitutional system. (*Kilbourn v. Thompson*, 13 Otto 168, 26 L. Ed. 377.)

The Supreme Court of the United States has given more than lip service to this fundamental doctrine. It has affirmatively recognized its prerogative—nay, its solemn duty—to enforce the separation of powers promulgated by those who wrote our Constitution.

It has unhesitatingly struck down attempts on the part of the legislature to invade the judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn v. Thompson, supra; Ogden v. Blackledge*, 2 Cranch, 272, 2 L. Ed. 276; *Reynolds v. McArthur*, 2 Peters

417, 7 L. Ed. 470; *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519; *Baltimore & Ohio R. R. Co. v. United States*, 298 U. S. 349, 80 L. Ed. 1209.

And for the same reason those provisions of the Portal-to-Portal Act of 1947 which purport to destroy the present cause of action must likewise be struck down. In changing those provisions, Congress has unquestionably yielded to "those powerful and growing temptations * * * to overstep the just boundaries of [its] own department and enter upon the domain of the others." *Kilbourn v. Thompson, supra.*

Justice Holmes, in two opinions characterized by his usual incisiveness, epitomized the basic distinction between the judicial and legislative power. First, in upholding a statute against an attack that it represented a legislative invasion of the judicial domain, he said:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." (*James v. Appel*, 192 U. S. 129, 48 L. ed. 377.)

Then in *Prentis v. Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, he stated his conclusion in the following terms:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Whatever might be said of the portions of the Portal-to-Portal Act which prescribe rules for the future, its provisions for retroactive operations—the provisions with which we are concerned here—fall clearly under the head of "judicial action" as thus defined. These provisions "*declare liabilities * * * on present or past facts;*" they say "what the law is"—and what the law was as to liability long before they were in effect; they determine the sum payable to plaintiffs by defendant under the employment relationship in existence prior to their adoption. These provisions operate in precisely the sphere in which the Courts can take—and have taken—action.

Employers had for some years after the adoption of the Fair Labor Standards Act of 1938 sought to exclude a portion of the time worked by employees from the scope of compensable working time under the terms of that Act. The administrator of the Wages and Hours Division and the Court consistently refused to adopt the principles for which these employers contended. And ultimately, in a series of three decisions, *Tennessee Coal & Iron Co. v. Muscoda Local 123, supra; Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers of America, supra; Anderson v. Mt. Clemens Pottery Co., supra,* the Supreme Court of the United States sustained the interpretation which had theretofore been given to the Act and held that all time worked should be compensable time.

In doing so, the Court was, of course, exercising its normal judicial function of construing and enforcing the rights and liabilities of parties under existing law. And, as we have seen, its decision in such a case is "final, and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution." *Webster v. Cooper, supra.*

But the 80th Congress chose to declare that that decision was not to be "final and binding." It thus chose to declare that the liabilities enunciated by the Supreme Court should not be enforced. It was in order to avoid the normal and proper effect of the Court's determinations in pending cases that Congress avowedly adopted the Portal-to-Portal Act.

As the Court pointed out in *Kilbourn v. Thompson, supra,* the judicial and legislative functions cannot be identical if the doctrine of the separation of powers is to have any meaning. If the Court was exercising a judicial function in determining whether or not employers were under an obligation to pay employees for the expenditure of their time and energy in such ways as the complaint in this case details, then obviously, the Legislature could not perform that function as well. Either the determination of these liabilities is judicial or it is legislative. If it is legislative then the Court never had the power to render its decisions in these cases at all. And if it is judicial then the Legislature has no authority to alter the determination of the Court.

But there is no doubt that the Court, in making its decisions in the cases referred to, was investigating, declaring and enforcing liabilities as they stood on present or past facts and under laws supposed already to exist. And it is equally clear that Congress has presumed to change those decisions, to nullify them, to interfere with the declaration and enforcement by the Court of liabilities as they stand on present or past facts. It was said in *United States v. O'Grady's Executors,* 89 United States 641, 22 L. Ed. 772:

> "Judicial jurisdiction implies the power to hear and determine a cause, and, inasmuch as the Constitution does not contemplate that there shall be

> more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to re-examination and revision of any other tribunal or any other department of the Government."

And again Cooley, at page 190, Volume 1 of his *Constitutional Limitations,* states the rule as follows:

> "But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the court, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, for the legislature would in fact act as a court of review to which parties might appeal when dissatisfied with the rulings of the court."

We now invite the Court's attention to an even more specific vice of the Portal-to-Portal Act with respect to its usurpation of judicial power. We refer to the distinction made between existing and future claims. It can be demonstrated beyond argument that the Court would have jurisdiction of the claims stated in the present complaint, even under the Portal-to-Portal Act, if the liability asserted had arisen after the passage of the legislation. In other words, under the rule of decision enacted by Congress, particular cases are singled out for discrimination and the rights involved are utterly destroyed (i.e., those arising before enactment), while identical claims arising after enactment are preserved intact. Congress has thus constituted itself judge and jury in disposing of these particular claims, in the plainest possible violation of Article 1, Sec. 3, of the Constitution.

To elucidate this discrimination, we turn first to Sec. 2 of the Portal Act which bans all existing claims which

are not based upon either "an express provision of a written or unwritten contract" (Sec. 2(a) 1), or upon "a custom or practice in effect at the time of such activity," (Sec. 2(a) 2).

On the other hand, Sec. 4, which deals with future claims, does not require any such provision of contract or custom as a condition precedent to liability, but permits recovery for all activities except those "preliminary to or postliminary to said principal activity or activities." The meaning of this distinction is clarified both in the congressional debates and in President Truman's message approving the Act, Senator Cooper, who managed the bill made the following statement with respect to past claims:

> "I have explained that the reason for this is that *in order definitely and surely to relieve against past claims, a stricter rule was adopted.*" (Italics ours.)

He was then asked by Senator Ellender:

> "Was not virtually the same rule adopted as to future claims"?

To which he answered:

> "I think not."

He then proceeded to point out the obvious fact that all "principal activity," as that term might be defined by the administrator of the Act, or by the courts, would be compensable in the future regardless of contract or custom, while such activity could not be used to sustain a past claim unless it had been the subject to a specific contract or custom.

The congressional debates make it clear that such activities, as changing clothes and preparing machines, when required by the nature of the work, constitute "principal activity" and are compensable in the future regardless of contract or custom. The Senate committee report gives as an example of "principal activity" the oiling and cleaning of machinery before commencing work. In the debates on the floor, Senator Cooper, in reply to a question by Senator McGrath, specifically stated that time required for changing clothes and bathing in a chemical factory would be considered a part of "principal activity." (See *Special Analytical Report* issued by the Bureau of National Affairs, pgs. 34 and 35).

It is thus abundantly clear that the very activities detailed in paragraph "XI" of the complaint, for which recovery is sought in the present actions, are in fact "principal activity" for which recovery would necessarily be allowed if the work had been done after May 14, 1947, the date of approval of the Act. This discrimination between identical cases, and decision of particular cases, is purely and exclusively a judicial function reserved to the court, as is shown by the quotations above.

On the basis of these authorities, it is respectfully submitted that the Portal-to-Portal Act must be held invalid as an attempted exercise of judicial power by the legislative branch of the government.

B.

The Act violates the Fifth Amendment by depriving appellants of their property without due process of law

> **"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested rights." (Chief Justice Marshall in Marbury v. Madison, 1 Cranch, 137, 163.)**

1. Vested Rights Under Contract

Appellee's motion to dismiss is addressed to the complaint as amended. The amended complaint, as herein pointed out, alleges two independent theories upon which appellants are entitled to recover. The first theory is in reliance upon appellants' *statutory* rights under the Fair Labor Standards Act of 1938. The second relies upon appellants' *contract* rights as third party beneficiaries under appellee's contract with the Government.

The Fifth Amendment to the Constitution provides that the Federal Government may not deprive an individual of his property "without due process of law." It is well settled that "a vested cause of action is property and is protected from arbitrary interference." *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

No proposition has been more firmly established in our jurisprudence than that under the American constitutional system a Legislature cannot take what belongs to one man and arbitrarily give it over to another, cannot appropriate the property of any individual in the United States for the use of the Government without the payment of just compensation therefor, cannot reach into the past to upset transactions already completed and nullify rights already vested in accordance with law. The courts

have unhesitatingly struck down attempted invasion of vested rights, attempted destruction by the Legislature of causes of action already accrued. And they have done so even where national policy and the immediate equities were on the side of the invading legislation. *Forbes Pioneer Boat Line v. Everglades Drainage District,* 258 U. S. 338, 66 L. ed. 647; *Osborne v. Nicholson,* 80 U. S. 654, 20 L. ed. 689; *Steamship Co. v. Joliffe,* 2 Wall. 450; *Hawthorne v. Calef,* 2 Wall. 10, 17 L. ed. 776; *Ochiltree v. Railroad,* 21 Wall. 249, 22 L. ed. 546; *Ettor v. City of Tacoma,* 228 U. S. 148, 57 L. ed. 773; *Coombes v. Getz,* 285 U. S. 434, 76 L. ed. 866; *Lynch v. United States,* 292 U. S. 571, 78 L. ed. 1434; *Treigle v. Acme Homestead Association,* 297 U. S. 189, 80 L. ed. 575; *Duke Power Company v. South Carolina Tax Commission,* 81 F. (2d) 513; *National Surety Corporation v. Wunderlich* (C. C. A. 8), 111 F. (2d) 622; *Badger v. Hoidale* (C. C. A. 8), 88 F. (2d) 808; *Harrison v. Remington Paper Company,* 140 F. 385, 390; *Knickerbocker Trust Company v. Myers,* 133 F. 764, 767.

Thus, in *Osborne v. Nicholson,* 80 U. S. 654, 20 L. ed. 689, it is said that:

> "Rights *acquired by* a deed, will or contract of marriage, or other contract executed *according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force.* This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood of intolerable evils." (Italics added.)

So insistent was the Court upon adherence to this doctrine that it refused to interpret even the Thirteenth Amendment as having the effect of divesting the seller of his right to the purchase price of a slave in the absence

of a specific provision to that effect in the amendment, and it declined to permit its antipathy for the institution of slavery to govern its judgment as to the propriety of the legislative action thus taken.

2. Vested Rights Arising Out of Statutes

During the congressional debates accompanying the passage of the Portal-to-Portal Act, it appears to have been conceded that vested contractual rights could not be taken away by subsequent enactments. It seems obvious therefore that the Portal-to-Portal Act, with its express exception of "contract" rights, cannot be constitutionally construed so as to deprive appellants of their rights as third party beneficiaries under appellee's contract with the Government.

In *Pacific Steamship Company v. Joliffe,* 2 Wallace 450, the court considered a California statute which provided that a pilot was entitled to half pilotage fees when, under certain circumstances, he had offered his services to a vessel and those services had been refused. Pending a suit for recovery of the compensation *due under the statute,* the legislature repealed the statute. In permitting the recovery, as against the argument that the original right was defeasible because "statutory" in origin, the court said:

> "The claim of half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute, but the transaction is not less a contract on that account."

It will be obvious that there is a perfect analogy between the *Joliffe* case and the present case: In both

cases recovery was sought for compensation fixed by the terms of a statute which was repealed while an action to recover was pending. In both cases it might well be argued that no right of recovery could exist without the statute. In fact, the present case is stronger than the *Joliffe* case, because here the services were not merely tendered, but actually performed.

In *Ettor v. City of Tacoma,* 228 U. S. 148, an action had been brought under the terms of a state statute which required compensation from a municipality for damage to the plaintiff's property, resulting from street grading. Before judgment, the statute was repealed, and the suit was then dismissed. In reversing the judgment of dismissal, the Supreme Court said:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

The latest case in the Supreme Court to apply this doctrine was *Coombes v. Getz,* 285 U. S. 434. A provision of the California state constitution created a liability on the part of directors of corporations to creditors for all moneys misappropriated by corporate officers. During the pendency of a suit to recover on this statutory liabil-

ity, the section making the directors liable was repealed. In the absence of such a section, there was no liability at common law. Upon appeal to the United States Supreme Court the creditors were permitted to recover. We quote from the opinion:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter denied its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end of the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right) to enforce his cause upon the contract.
>
> Here both parties acted. The creditor extended credit to the corporation; and his action in so doing under the state constitutional provision brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law, created against himself a contractual liability in the nature of a suretyship."

3. The congressional finding of an "emergency" calling for the use of the commerce power cannot justify the total destruction of the petitioners' property rights

From time to time, the Supreme Court has approved legislation under the so-called "emergency doctrine," i.e. on the theory that in times of national emergency, the power of Congress may be extended to an extent reasonably necessary to meet such emergency. The doctrine proceeds on the assumption that while an emergency can never create a power which theretofore did not exist, the existence of an emergency may justify the exercise of power which might otherwise be unreasonable and therefore illegal.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

This doctrine is subject to the following reservations:

(1) There must be a genuine emergency within the general powers of Congress to meet by legislation.

(2) The legislative means taken to meet the emergency must be reasonable and non-discriminatory.

(3) Rights and remedies may be *impaired* to some extent when such impairment is required by the emergency, but if rights are *totally destroyed,* the government must compensate the owners of these rights.

Typical of the "emergency" cases was *Norman v. B. & O. Railroad,* 294 U. S. 240, the so-called "gold clause" case which is cited in the *Seese* opinion. Here it was held that legislation forbidding payment in gold was within the general power of Congress because of its control over the monetary system; that the international financial

emergency justified such a restriction with respect to the unpaid portion of gold bonds; and that the substitution of paper payment for gold payment *only altered and did not destroy,* the rights of the bondholders.

It will be readily seen that the present case is totally dissimilar to the gold clause case. Concededly, the Portal-to-Portal Act is valid with respect to employment after its date, just as the gold legislation was held valid with respect to payments coming due in the future. Future activities under continuing contracts within the general area of congressional control have, as the court pointed out, a "congenital infirmity," i.e. they are subject to change with respect to the unexecuted portion. If this were not so, the effect "would be to place to this extent the regulation of interstate commerce in the hands of private individuals."

Again, in the present case the rights of the appellants are not simply impaired; they are totally and irrevocably destroyed. When this is done even for a public purpose, the Fifth Amendment requires that compensation be paid (*Louisville Bank v. Radford,* 295 U. S. 555).

For the reasons stated, we submit that the Portal-to-Portal legislation will not pass the judicial inquiry which must always be made, both as to the existence of the emergency and the reasonableness of the means chosen to meet it.

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in these (constitutional) limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to

> the end that the Constitution as the supreme law of the land may be maintained."
>
> *St. Joseph Stockyards Co. v. United States,* 298 U. S. 38, 80 L. Ed. 1033.

When such a scrutiny is made here, it is abundantly clear in the first place that no emergency in fact existed. In the very case which aroused the interest of Congress (*Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680), the Court was careful to point out that the facts and liabilities of each particular case should be determined in the light of the familiar *de minimis* rule. Following that opinion, and before the passage of the Act, the trial court in the same case had followed this rule and dismissed the particular case entirely. It is certain, therefore, that no "wholly unexpected liabilities, immense in amount," would "bring about financial ruin of many employers."

Moreover, it is entirely clear that not even Congress believed these dire forebodings. Here is a strange emergency indeed—an emergency so acute that Congress in one and the same statute expressly authorizes the maintenance in the future of causes of action identical with those accruing in the past which, it is claimed, must be banned in order to save industry from financial ruin.

By the same token, it must be clear that the means selected by Congress are unreasonable and illegal as a matter of law, even if the Court should find justification for the declaration of an emergency. As is pointed out in the *Radford* case, if vested rights are to be destroyed for the benefit of the public, the public must pay compensation. Here, beyond any doubt, such rights are sought to be abolished entirely, and all remedy for their enforcement is claimed to have been taken away. At the same time, identical rights in the future are approved and validated.

We believe it clear from the authorities cited above that the present case is controlled squarely by the doctrine established in a long line of Supreme Court decisions protecting vested property rights against retroactive legislative interference. Individually these are small claims, and it may well be that when the *de minimis* rule is applied, the total liability will not be large; they are nonetheless entitled to that equal protection of the law which is the most characteristic and prized feature of our free government—a government of laws and not of men.

The Congress that passed the Portal-to-Portal Act of 1947, and the interests which now urge the courts to ratify such legislative destruction of rights, are shortsighted indeed. The doctrine for which they contend today may tomorrow be invoked in violation of their own more extensive property rights. If the 80th Congress may, by the Portal-to-Portal Act, constitutionally strike down the just claims of these appellants, no power on earth exists to prevent the next Congress from repealing the Portal Act and thus reinstating these claims—or a substantial portion of them.

CONCLUSION

1. The Circuit Court of Appeals, in holding the Portal-to-Portal Act of 1947 constitutional, has decided an important and substantial Federal question which has not been, but should be settled by this court.

The question of the constitutionality of this legislation has been inherent and notorious since it was first proposed. At one point, alternative provisions were included in the Senate Bill, to take effect if the preferred version should be held invalid.

See: Bureau of National Affairs, "Special Analytical Report" Pg. 83, 47 Columbia Law Review 1010.

Since its validity has been under attack in the courts, many doubts have been expressed as to the propriety and constitutionality of the Act.

See: *Cochran v. St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288.

Boehle v. Electro Metallurgical Co., 72 F. Supp. 21.

Sveltik v. Vultee Aircraft Corp., 16 U. S. Law Week 2161, 7 W. H. Cases 282 (Not officially reported).

Finally, although the Act has been upheld in three circuits by the Circuit Courts of Appeal, there is no unanimity of opinion on the basis of the decisions.

Seese v. Bethlehem Steel Company, 168 Fed. 2nd 58.

Rogers v. Reynolds, 166 Fed. (2d) 317.

An authoritative decision of this court is required in order that the rights of several thousand litigants in actions now pending in the district courts may finally be determined.

2. The Circuit Court of Appeals has decided important questions of Federal law in a way which appears to conflict with applicable decisions of this court.

(a) In holding that the rights of which petitioners were deprived by Section 2 (a) of the Act are not protected by the Fifth Amendment of the United States Constitution, the Circuit Court of Appeals failed to follow and apply the following decisions of the court, among others:

Pacific Mail Steamship Company v. Joliffe, 2 Wallace 450, 17 L. ed. 805.

United States v. General Motors Corporation, 323 U. S. 373, 89 L. ed. 311.

Ettor v. City of Tacoma, 228 U. S. 148, 57 L. ed. 773.

Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866.

(b) In failing to condemn the Portal-to-Portal Act as a legislative invasion of the judicial power in violation of Article III, Section 1 of the Constitution, the Circuit Court of Appeals reached a decision not consistent with the following authorities in this court:

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

James v. Appel, 192 U. S. 129, 48 L. ed. 377.

Prentis v. Atlantic Coastline Co., 211 U. S. 210, 52 L. ed. 150.

United States v. Klein, 13 Wallace 128, 20 L. ed. 519.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Sixth Circuit in these actions.

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